

ANSWERS

F. O. R.

The African Company

To the Petition presented by Sir John Swinton.

Sir John, Mrs. Blackwood and Smith, &c. (having been intrusted to receive the first Fourth Part of the Money Subscribed) granted a Receipt of 750 £. Sterline to the Lady Hopton and her Son on the 28 of February 1696,

This Money is not posted in their Books as Cash received, but in place thereof a Bond granted by Mr. Watson (of a days date posterior to the foresaid Receipt) bearing to be for the Lady and her Sons share subscribed.

The Lords have found, all the Subscribers of the Receipt lyable *in solidum*, notwithstanding that the Committee of the Treasury got up Mr. Watsons Bond with the rest. And that twice, first in a pursuit against Mr. Blackwood, whereto Sir John was called; And now in the pursuit, directly against himself for the foresaid 750 lib.

Sir John reclaims on the same Grounds that were debate in presence, craving, and. That he may not be found lyable *in solidum*, but for his proper Fact. 2da. At the least, Mr. Blackwood ought to be first discussed, as having had a particular Administration. 3tia. That this pursuit being carried on upon Mr. Blackwoods Expenses, it may be sustained against him (as if it were in his own Name for Relief) that he being intrusted with blank Receipts, his giving one for Cash, and not for a Bond, was his proper Deed. Or his not stating the Accompt fairly to the Company, and obtaining Exoneration from them thereon, was his own neglect.

It is Answered,

To the first, That it has been hitherto thought a principal, that Mandatars, especially *in facto prestando*; Or (as the Petition terms it) *in individuo*, are lyable *in solidum*, which is so obvious, and was so by the common Law every where received. Lbo. § 3. ff. Mandat. That there needs no reasoning on the head; especially in Favours of a publick Society, whose Managers might otherwise, send off some of their Number with the effects whereof those who remain might partake by conveyances legally undiscoverable.

To the 2d. Its equally clear, that the Deed of Managers jointly trusted, dividing the Administration betwixt themselves, can never alter the Condition of their Obligement to their Constitutes, who did not approve thereof. And thus it was, even in the Roman Law, when the Administration of the Tutory was not divided by the Defunct who appointed them, or by a Judge. And seing the Petitioner requires a Decision, it is expressly decided February 22 1634, Davidson contra Jack, That two Tutors, both of them Subscribing a Receipt jointly, the one was found lyable *in solidum*, tho the other was the Pursuers Uncle. And my Lord Stair lib. 1. Tit. 6. N. 23. observes, That the order of discussing the Tutor who did Administrat in the first place, does not obtain by our Custom.

Nor ought it to be otherwise in Managers appointed by a publick Society, because the Reason is the same, or greater. For as the trusting one of the under Managers, is not the Deed of the first Constitutents; So a party delegat, cannot

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Subdelegat another ; and such under Managers *sefe offerendo*, did subject themselves to the Hazard.

To the 3d, it is Answered,

1mo. That its not proven, if, or how far, the pursuit is to Mr. *Blackwoods* behoof. For there is a publick order of the Council-General to their Cashier, for raising and insisting therein. But further,

2do. *Et separatim*, Suppose it be offered to be proven, that this pursuit is for Mr. *Blackwoods* behoof, in whole or in part; yet there is nothing relevantly said against him for excluding him from Relief, he alwise deducing his own share. But on the contrair, its most just that Sir *John* should bear his own part of the burden. Because,

In the first place, its not Relevant to alledge, That blank Receipts were intrusted to Mr. *Blackwood*, unless it be said and proven that this was done at or before the 28 of February 1696 (which was the date of the Receipt granted to the Lady *Hopetoun* and her Son) or that that particular Receipt was so intrusted, either of which would be most false.

For if all these under Managers acted jointly and promiscuously (which is true, and presumed to be so) at the beginning when Subscribers came in throng with their shares : It is nothing to the purpose, albeit Ten or Twelve Weeks thereafter, Mr. *Blackwood* had attended best in the Office, when perhaps one or two would not come in in a whole day. And tho he had got some blank Receipts subscribed by those who went about their own Affairs while he waited the Druggie of the Office.

In the next place, Such a Trust, even at or before the date of the Receipt in Question, is only probable by Write or Oath of Mr. *Blackwood*. For Sir *Johns* Obligation arising from his Subscription, being in Write, cannot be taken away any otherwife.

Especially considering, that the Charges against Mr. *Blackwood*, are unfair and Calumnious : It being most certain, that at that time Mr. *Blackwood* was not bound for Mr. *Watson*, nor owing to Mr. *Watson* one Sixpence ; Whereas, on the contrair, Sir *John* was owing to Mr. *Watson* above 40000 Merks ; and in consideration whereof Mr. *Watson* can declare, that it was at Sir *Johns* particular desire that the Receipt was given, and the Bond taken, as aforesaid.

In the 3d. place, Mr. *Blackwood* at Compting with the Committee of the Company's Treasury, neither could have done, nor obtained any more then he did.

For clearing whereof, the Lords would be pleased to be informed, 1mo. That Sir *John* was personally present in the Sederunt which appointed the Accompts of the Money and Bonds to be called for and taken in, so that he cannot pretend Ignorance thereof. 2do. Tho Mr. *Blackwood* had Twenty times demanded it, yet neither the Committee of the Treasury, no, nor the Directors would or could have taken Mr. *Watsons* Bond for Cash. For this being the lending out of the Money actually received from one, not to himself (which even needed an order of the Council General) but to another third parry, was not in the power, as not being in the Instructions, or design of the Direction, so that Mr. *Blackwood* was in no neglect in omitting what was needful.

But the Company adheres to their Grounds in Law for making *Swintoun* lyable as well as Mr. *Robert Blackwood* : And what is further proposed, is only to evidence their impartiality in pursuing the one as well the other.

In respect whereof, the Lords ought to adhere simply to their former Interlocutor, so far as it shall not be proven that the Company hath received actual payment. As also adhere thereto, even quoad the Remainder beyond Mr. *Blackwoods* own share (which so far it is to his behoof he must deduce) in regard the Petitioner cannot prove *scriptor vel juramento*, that Mr. *Blackwoods* Trust from him was prior to the date of *Hopetouns* Receipt, and the offering a third Parties Bond for Money payed in by another, had been Frustraneous.